IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-862

UNITED AIR LINES, INC.,

Appellant,

vs.

GEORGE E. MAHIN, ET AL.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

BRIEF AS AMICI CURIAE OF AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, DELTA AIR LINES INC., AND NORTH-WEST AIRLINES, INC.

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This brief is presented with the consent of the parties, as shown by copies of letters from the parties' attorneys which have been filed with the Clerk.

Interest of Amici Curiae.

This case involves the levy of Illinois use tax on the loading of fuel on airplanes that are about to take off on interstate and foreign flights. The airlines filing this statement as *amici curiae* support and adopt the position and argument in appellant's brief that the Commerce Clause forbids such a tax. The *amici curiae* have a direct interest

in the outcome of the case because of the large tax liabilities involved. For example, American's claims for use taxes so levied and paid on the use of airplane fuel for a six-year period total more than $2,400,000, Braniff's more than $88,000, and Northwest's more than $700,000.

Statutory Provisions.

The following provisions of the Illinois Use Tax Act (Ill. Rev. Stat. 1971, ch. 120, §§ 439.1*ff.*) are relevant in this case:

> § 2. "Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, . . .
>
> § 3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer, . . .
>
> * * * * *
>
> To prevent actual or likely multistate taxation, the tax herein imposed does not apply to the use of tangible personal property in this State under the following circumstances:
>
> (a) The use, in this State, of tangible personal property acquired outside this State by a non-resident individual and brought into this State by such individual for his or her own use while temporarily within this State or while passing through this State;
>
> (b) the use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce or by lessors under a lease of one year or longer executed or in effect at the time of purchase of tangible personal property to interstate carriers for-hire for use as rolling stock moving in interstate commerce as long as so used by such interstate carriers for-hire;
>
> (c) the use, in this State, of tangible personal property which is acquired outside this State and

caused to be brought into this State by a person who has already paid a tax in another State in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other State;

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other tangible personal property that is used solely outside this State.

The appealed decision holds that the exemption from the tax by clause (d) of section 3 does not apply to airplane fuel acquired outside the state, brought and stored here temporarily, and consumed in interstate and foreign flights. The decision holds that the loading of the fuel in the airplane is a taxable event under the provisions of sections 2 and 3 quoted above.

ARGUMENT.

This case raises important questions concerning the scope of the protection afforded by the Commerce Clause against the direct encroachment by the states upon the stream of interstate commerce. More particularly, it involves the preservation of the Commerce Clause as a check upon "the disposition of cities and states to exploit their location astride the Nation's portals".* Unlike the Court's recent decision in *Evansville-Vanderburgh A. A. Dist.* v. *Delta Airlines, Inc.*, 92 S. Ct. 1349 (1972), this case involves, not the right of a state to exact reasonable charges for the use of state-provided facilities, but its power to augment its general revenues through excise taxes laid directly and disproportionately upon interstate commerce. However, the very fact that the Court has conceded to the states the power to impose charges like those in the *Evansville* case heightens the importance of this case: it emphasizes the need for protecting the Nation's interest in the free movement of goods and persons against unwarranted exactions that add to an accumulating burden of impediments to interstate air commerce.

In the decision appealed from, the State of Illinois, by virtue of its position as the situs of a terminal having the heaviest interstate and international air traffic of any airport in the world, has sought to allocate to itself, through a tax "upon the privilege of using" personal property, the entire value of the aviation fuel moving through that terminal onto planes using the terminal. Its claim rests on the theory that the loading of fuel into the tanks of the airplanes before take-off is a local taxable event, rather

* Jackson, *J.*, concurring in *Canton R. Co.* v. *Rogan*, 340 U. S. 511, 517 (1951).

than an integral part of interstate and foreign commerce. That theory is plainly untenable in the face of this Court's decisions in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954), and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), and is contrary to principles long followed by the Court in preserving the very process of interstate commerce from direct taxation by the states.

The tenuous nature of Illinois' claim is apparent from the facts concerning the movement of the fuel Illinois is attempting to tax. The fuel is not produced, sold, or consumed in Illinois. It is continuously committed to and moving in interstate commerce from before it enters Illinois until it leaves Illinois. United Air Lines, the appellant, purchases the fuel from a seller in Indiana. Title passes in Indiana, and United takes delivery in Indiana.* The fuel moves from the seller's terminal in Indiana through common-carrier pipeline (or by common-carrier trucks) directly to the airlines' storage and handling facilities at O'Hare and Midway airports. After a brief delay, during which the fuel is tested for quality and filtered to remove impurities arising from the transportation process, it is pumped into the tanks of the airplanes. Fuel moves from Indiana on a daily basis. Its flow is interrupted in United's facilities at the airports only to the extent required by the practical exigencies of operation and the necessity for having a supply on hand to meet the schedule of traffic. The average period of delay is from two and a half to six days, varying with the type of fuel and the storage facilities involved. (Stip. par. 7, App. 38.) The planes which receive the fuel are either commencing interstate and foreign flights or are taking off in

* The Indiana Gross Income Tax is paid on the transaction in Indiana (Stip., par. 13, app. 41). Cf. *International Harvester Co. v. Dept. Treasury*, 322 U. S. 340 (1944).

continuation of interstate and foreign flights after a temporary stop for unloading, loading, and fueling. The fuel loaded aboard them is consumed entirely in interstate flight and, except for negligible quantities, outside the borders of Illinois.

Such a continuous movement of a commodity as part of an integrated interstate process affords no basis for a state tax upon the value of the commodity. The temporary presence of the aviation fuel under the circumstances of this case could not constitutionally be made the basis for a property tax on its value, and a similar tax denominated a "use" tax and asserted to be for "storage" could fare no better under the Commerce Clause.* The applicable test is that stated by Chief Justice Hughes in *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 (1932), upholding a gasoline tax on the value of gasoline stored by a bleachery for use in its manufacturing processes within the state. "[W]e are not concerned with what the tax is called but with what the statute does. It imposes an exaction with respect to gasoline purchased in other States and brought into South Carolina and there placed by appellants in storage for future use within the State. By the terms of the Act, as construed by the state court and applied to these appellants, interstate commerce in relation to the subject of the tax has ended. The gasoline has come to rest within the State, having been placed in appellants' storage tanks and added to appellants' property kept for local purposes. In such circumstances the State has the authority 'to tax the products or their storage or sale.'"

In this case the fuel has never "come to rest" within Illinois within the meaning of the decisions of this Court,

* The use tax is obviously more objectionable than a property tax from the standpoint of the purposes of the Commerce Clause. In the case of moving goods, a property tax would fall only on the value of the quantity present in the state on tax day; the use tax falls on the entire value of the flow throughout the year.

it has never been "kept for local purposes" or stored "for future use within the State," and interstate commerce has not ended. *Coe* v. *Errol,* 116 U. S. 517 (1886); *Champlain Co.* v. *Town of Brattleboro,* 260 U. S. 366 (1922); *Hughes Bros. Co.* v. *Minnesota,* 272 U. S. 469 (1926); *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95 (1929); cf. *Joy Oil Co. Ltd.* v. *State Tax Commission,* 337 U. S. 286 (1949); *Empresa Siderurgica S. A.* v. *Merced County,* 337 U. S. 154 (1949). The crucial question in determining whether the state may tax, as said in *Minnesota* v. *Blasius,* 290 U. S. 1, 9 (1933), is whether there is "continuity of transit." "If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of movement." 290 U. S. at 9-10. A breach in the continuity of transit has most often been found where the temporary halt or storage was of a kind giving rise to the possibility that the property might be diverted from its interstate destination to a local one, a circumstance plainly absent here. Cf. *Minnesota* v. *Blasius; Joy Oil Co. Ltd.* v. *State Tax Commission.* Mere delay in transit, or temporary storage, is not by itself sufficient to allow the state to tax, and interruptions for weeks or even months have been held not to deprive the property in transit of its immunity from state taxation. *Coe* v. *Errol; Champlain Co.* v. *Town of Brattleboro; Hughes Bros. Co.* v. *Minnesota.* The brief delay of the fuel in appellant's tanks in this case is a far cry from the fifteen months' storage while awaiting trans-shipment which was held, by a sharply divided Court in the *Joy Oil Co.* case, to bar immunity from local taxation. The delay here is similar to the temporary storage in *Carson Petroleum Co.* v. *Vial,* where there was an accumulation of oil in the dockside tanks of the exporter

while waiting for ships to arrive, a delay occasioned by the practical necessities of carrying out the continuous interstate transit.* If United took its aviation fuel in tank trucks at the Indiana refinery, drove the trucks directly to the side of its airplanes, and loaded the planes from those trucks, it would be beyond dispute that the fuel was in interstate commerce throughout its passage in Illinois. Under the cases cited above, the result can be no different merely because pipelines and tanks at the airport are used instead.

It is apparent, therefore, that Illinois could not impose its tax by reason of the presence or "storage" of the fuel in Illinois. But in fact Illinois has not purported to do so. In recognition of the constitutional principles reflected in the above-cited cases, the Illinois Use Tax Act does not attempt to reach the temporary storage of property in interstate commerce. It expressly excludes from the definition of a taxable use "the temporary storage of property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State." § 3, clause (d), above pp. 2-3. Although this exemption may cover even some situations where the property is not in interstate commerce, it is clearly broad enough to cover those where, as in this case, the property is in continuous interstate transit.

In the face of this statutory provision, the problem for the Illinois taxing authorities in attempting to reach

* The testing for quality and filtering of transportation impurities that occurs as the aviation fuel moves through United's tanks is likewise plainly a necessary incident of the interstate movement and not an independent "processing" that could be deemed to break the transit. Quite properly, Illinois has not relied on this aspect of the case to support its tax, any more than it could rely on changes in the size of pipeline or changes in the mode of transportation. Cf. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157, 163 (1954), where the gas was "compressed, cooled, scrubbed, and dehydrated" as part of the interstate movement.

United's aviation fuel was to find a "use" of the property occurring after "temporary storage" but not "outside this State." A "use" within the statute could be found in the consumption of the small amount of the fuel burned in the airplanes during the Illinois portion of their departing flights. The Department of Revenue initially sought to tax only that use. But that "use," as was later recognized, was one that Illinois is forbidden to tax under the many authorities prohibiting direct taxation of interstate commerce, including those discussed above, but most particularly under this Court's decision in *Helson and Randolph v. Kentucky*, 279 U. S. 245 (1929), specifically forbidding a tax on the use of gasoline within the state by a carrier engaged in interstate commerce.

The new position of Illinois, represented by the decision below, seeks to escape this dilemma by an artful interpretation of the statute. Extending its grasp to the entire amount of the fuel, Illinois has now purported to find in the very act of loading the fuel on board the airplanes an event that breaks the "continuity of transit" and constitutes a local use. As explained in the ruling of the Illinois Department of Revenue upheld by the Illinois Supreme Court, "The Department's position is that temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane, railroad engine or truck. At this point, the fuel is *converted into its ultimate use,* and, therefore, a taxable use occurs in Illinois." (App. 23. Italics supplied.) Employing a slightly different verbal formula, the Illinois Supreme Court has said that the *intention* of United to use the fuel "only to facilitate [its] operations from the O'Hare and Midway airports" (and, thus, to use the fuel within the State) deprives the fuel of the "temporary storage" exemption of the Illinois statute (App. 202).

On either formulation, it is obvious that the operative event that Illinois deems sufficient to allow it to tax is the loading of the fuel on board airplanes for consumption in interstate commerce. The Illinois Supreme Court's emphasis on "intention" as the decisive circumstance (presumably because the intention comes before the loading) cannot disguise the fact that it is the loading and use of the fuel that alone triggers the tax. Indeed, the Illinois court's reliance on "intention" stands constitutional doctrine on its head. While it is settled that mere intention to commit property to interstate commerce cannot *confer* immunity from state taxation (cf. *Empresa Siderurgica v. Merced County*, 337 U. S. 154 (1949)), it is a bizarre holding that such an intention *deprives* the property of its immunity and can be the very basis for a state tax.

Under the decision below, the case must be considered precisely as if the Illinois statute read, "A tax is hereby imposed upon the loading of fuel on airplanes bound on interstate and foreign flights". The Illinois Supreme Court concedes that the tax would not apply if fuel were loaded and transported out of the state by any means other than flights of interstate aircraft. "It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax" (App. 202). The Illinois court has thus adopted a special interpretation of the statute for the sole purpose of reaching fuel loaded for interstate flights. The vice of the tax is compounded. Not only is it a tax on "interstate commerce". It is a tax that is "aimed at or discriminates against" interstate commerce.

Unless the Court is to abandon both ancient and recent

authority, a tax on the loading of interstate carriers is a tax on interstate commerce itself and is forbidden. In *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), the Court held invalid, as a direct tax on interstate commerce, a gross receipts tax on the loading and unloading of interstate vessels. "The transportation in commerce," said the Court, "at the least, begins with loading and ends with unloading." (330 U. S. at 427.) That decision was a reaffirmation of *Puget Sound Stevedoring Co.* v. *Tax Commission* 302 U. S. 90 (1937), and a long line of earlier cases outlawing gross receipts and similar taxes levied "on the commerce itself." (330 U. S. at 433.) The decision was reached over a dissenting opinion which acknowledged the controlling force of the line of decisions relied on by the majority but proposed that the doctrine be changed.* The Court again adhered to its position and reaffirmed the principle of the *Carter & Weekes* case in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954). The Court there held invalid a Texas tax on the "gathering" of natural gas as applied to the "taking" of the gas by an interstate pipeline from the pipes of the producer. As the opinion said, "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate commerce, the flow of commerce, that it cannot realistically be separated from it." (347 U. S. at 166.) The Court declined to recognize the event of transferring the gas from the pipeline of the gasoline plant to the pipeline of the interstate carrier (the

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* Mr. Justice Douglas' dissenting opinion proposed that a "fairly apportioned" tax be sustained, notwithstanding that it was a direct tax on the commerce. That suggestion would of course be of no help to the Illinois tax in the present case, since it is a tax levied on the entire value of the fuel being loaded. In this respect, indeed, the present case presents a much more drastic imposition than the tax condemned in *Carter & Weekes*, where the tax was only on the value of the loading activity itself, not on the goods being loaded. Compare *Canton R. Co.* v. *Rogan*, 340 U. S. 511 (1951), emphasizing the importance of this distinction under the Export-Import Clause.

"taking or loading for transmission," *id.* at 167) as a severable local event—and this notwithstanding that the transfer in the *Pipe Line* case, in contrast to the instant case, coincided with a change of possession and the transfer of title. The tax on loading involved in the present case is indistinguishable from the tax on gathering held invalid in the *Michigan-Wisconsin* case.

Edelman v. *Boeing Air Transport, Inc.*, 289 U. S. 249 (1933), obliquely relied on by the court below, does not support the Illinois tax. The *Edelman* case sustained a fuel tax as a tax upon "the storage and withdrawal" of the fuel, not as a tax on the loading, as this Court explicitly and correctly recognized in the *Carter & Weekes* decision, where *Edelman* and similar cases were distinguished. (330 U. S. at 431, 432 n. 18, citing the Court's earlier decision in *McGoldrick* v. *Berwind-White, Co.*, 309 U. S. 33 (1940).) And the facts as to storage differed markedly from those in the present case: the gasoline brought from out of state was commingled in the taxpayer's tanks with gas purchased intrastate and it was held not only for use in the taxpayer's planes but for sale to others. In addition, under the Court's recent decision in the *Evansville* case, 92 S. Ct. 1349 (1972), the exaction in *Edelman* was readily sustainable on the ground that it was limited to the maintenance and improvement of the municipal airports used by the air transport company.* Clearly the State of Wyoming could not have been suspected of attempting to exploit interstate commerce by reason of a strategic geographic position in air transportation.

* In the Court of Appeal's opinion, *Boeing Air Transport* v. *Edelman*, 61 F. 2d 319, 323 (C. A. 10, 1932), it was explained that, after the City of Cheyenne gave the appellant air carrier the right to use the city's airfield for 25 years, the legislature amended the tax statute to provide that "the State Treasurer shall pay over all funds received from the gasoline license tax on gasoline used at any municipal air field to the city or town where such air field is located, to be used for the maintenance and improvement of such air field".

Aside from those differences, the *Edelman* case represented a high-water mark in the Court's search in the early thirties for formulas that would assist states in finding additional sources of revenue. It reflected an incipient permissiveness toward taxation of the process of interstate commerce that has been rectified by the subsequent course of decision. Mr. Justice Stone, reluctantly concurring in the *Helson* decision, had advanced the view that no "practical justification" could be found for relieving interstate commerce from a tax "which is neither aimed at nor discriminates against interstate commerce" (279 U. S. at 253). His opinion for the Court in the *Edelman* case a short time later plainly reflected that attitude. But as the Court noted in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, "this view has not prevailed" (347 U. S. at 166). Mr. Justice Stone had himself helped lead the Court toward recognition that the "practical justification" for more stringent rules is the danger that a state, even under a nondiscriminatory tax, may attribute to itself values to which other states may lay equal claim under similar or different taxes. Thus the danger of "multiple burdens," actual or potential, became an additional touchstone. It was forcefuly urged in Chief Justice Stone's 18-page dissent, joined in by three Justices, in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292 (1944), where a divided and troubled majority upheld a Minnesota property tax on the entire value of a fleet of airplanes based there: "The tax now sustained is so obviously disproportionate to the protection afforded to the taxed property by the taxing state as to place a constitutionally intolerable burden on interstate commerce. . . . It is no answer to suggest that the states other than Minnesota have not asserted their constitutional power to tax or that we do not know how or to what extent they may have exercised it. . . . It is enough to know that the tax exposes petitioner to 'the risk of a multiple burden to which local commerce is not exposed' [citing *Adams Mfg. Co.* v. *Storen*, 304 U. S.

307, 311 (1938), and *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 439 (1939)]." (322 U. S. at 326).

A constitutional theory permitting Illinois to tax the entire quantity of fuel "loaded" or "taken" in Illinois would be difficult to reconcile with denial of similar claims by other states based on similar "incidents" such as "bringing in" or "consumption." See *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. at 429. The claim asserted by Kentucky in the *Helson* case shows that the danger is not fanciful, not to mention the claim of Indiana in the present case to a tax on the gross receipts from the sale.

The solution urged by Chief Justice Stone's dissent in the *Northwest Airlines* case was "apportionment". In that and other contexts the notion of apportionment has at times been put forward as an alternative or a supplement to the rule forbidding "direct" taxation of the process of interstate commerce and the instrumentalities of interstate commerce. See *Standard Oil Co.* v. *Peck*, 342 U. S. 382 (1952); *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653 (1948); *Canton R. Co.* v. *Rogan*, 340 U. S. 511 (1951); and cases discussed in the dissenting opinion of Douglas, J. in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 434 (1947). That view might conceivably lead the Court, in a case presenting the issue, to a reexamination of the *Helson* case and to acceptance of the "burn-off rule" initially followed by the Illinois Department of Revenue, taxing the portion of fuel actually used within the state. Such a departure might have far-reaching implications for the doctrine forbidding direct impositions "on interstate commerce itself." But those problems are irrelevant to the validity of the tax involved in the present case, which is a tax on the entire value of the fuel used in interstate operations and in no sense an apportioned tax.

The issue in this case is narrow but important. Sustaining the Illinois tax would destroy the clear boundary of protection long maintained by the Court around the very process of interstate commerce and its instrumentalities. Ever since *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326 (1887), the Court has been alert to guard the facilities of interstate commerce and the interstate movement of goods against excise taxes in the nature of gross receipts taxes bearing directly on the interstate process itself. This special solicitude has not been nullified or eroded by the emergence of the doctrine that "interstate commerce must pay its way," reflected in decisions permitting sales and use taxes in a variety of situations involving interstate transactions. E.g. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937); *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940). The question was thoroughly recanvassed in 1947 in the *Carter & Weekes* case, and the long-standing recognition of a special zone of protection for the very process of interstate commerce was reaffirmed. Nor has the principle been called into question by the Court's very recent decision in the *Evansville Airport* case. That decision merely followed the distinction, recognized in many prior cases, between a toll or fee for the use of state-provided facilities and a general-revenue tax.

The principle involved is not a merely artificial, mechanical, or technical concept, although its enforcement necessarily involves maintaining a constitutional line of demarcation between segments of a physical and economic continuum. The doctrine is prophylactic in its purpose and effect. Its practical function is that the national interest in the free and efficient movement of goods and persons is protected against local exploitation of the channels essential to the national market and the national community. Such protection is required not only as against the more obvious forms of such exploitation, such as

frankly discriminatory taxation, but also against the temptation of states to structure or distort their tax systems so as to throw an undue proportion of their costs of government upon special sources of interstate-commerce revenue inherent in their geographic position. That the temptation is a real one is illustrated by the present case. Illinois has not in general attempted to tax property that is only temporarily within the state and that is to be used outside the state. It clearly could not tax the consumption of fuel by airplanes in interstate flights, even though such consumption took place within the state's borders. Yet in this case it has contrived to interpret its tax laws to enable it to tax the entire amount of aviation fuel supplied for interstate and foreign commerce at one of the largest airports in the world. Since it has been compelled to do so by focusing the tax upon an integral step in interstate commerce, it has transgressed the settled bounds of state taxation.

The judgment of the Illinois Supreme Court should be reversed.

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